

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STACIE M. GORMAN)	
Plaintiff,)	No. CV-09-3109-JPH
)	
v.)	ORDER GRANTING PLAINTIFF'S
)	MOTION FOR SUMMARY JUDGMENT
MICHAEL J. ASTRUE, Commissioner)	AND REMANDING FOR FURTHER
of Social Security,)	ADMINISTRATIVE PROCEEDINGS
)	
Defendant.)	
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BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on September 17, 2010 (Ct. Rec. 16, 23). Attorney Donald C. Bell represents Plaintiff; Special Assistant United States Attorney Franco L. Becia represents the Commissioner of Social Security (Commissioner). The parties have consented to proceed before a magistrate judge (Ct. Rec. 13). On September 30, 2010, plaintiff filed a reply (Ct. Rec. 26). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, **REVERSES** and **REMANDS** for further administrative proceedings (Ct. Rec. 16) and **DENIES** Defendant's Motion for Summary Judgment (Ct. Rec. 23).

JURISDICTION

Plaintiff protectively filed applications for disability insurance benefits (DIB) and supplemental security income (SSI) on

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1 June 15, 2007, alleging an amended onset disability date of March
2 23, 2007¹ (Tr. 98-102) due to depression, anxiety, agoraphobia,
3 body aches, and hand numbness and tingling (Tr. 103, 502-504). The
4 applications were denied initially and on reconsideration (Tr. 28-
5 29, 32-34, 498-499). At hearings before Administrative Law Judge
6 (ALJ) R. S. Chester in December 2008 and April 2009, plaintiff,
7 represented by counsel, psychologist Thomas McKnight, Ph.D.,
8 medical expert David Pullman, M.D., and vocational expert (VE)
9 Daniel McKinney testified (Tr. 531-549, 552-593). On May 28, 2009,
10 the ALJ issued an unfavorable decision (Tr. 11-18). The Appeals
11 Council denied Ms. Gorman's request for review on October 9, 2009
12 (Tr. 4-6). Therefore, the ALJ's decision became the final decision
13 of the Commissioner, which is appealable to the district court
14 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for
15 judicial review pursuant to 42 U.S.C. § 405(g) on November 16,
16 2009 (Ct. Rec. 1,4).

17 **STATEMENT OF FACTS**

18 The facts have been presented in the administrative hearing
19 transcript, the ALJ's decision, the briefs of both plaintiff and
20 the Commissioner, and are briefly summarized here.

21 Plaintiff was 34 on the amended onset date and 36 at the last
22 hearing. She has a ninth grade education. Plaintiff is one test
23 short of earning a GED (Tr. 168, 567). Ms. Gorman has worked as a
24 cashier, fruit packer, retail stock clerk, prep cook/fast food
25

26 ¹Despite the amended onset date, the ALJ's decision states
27 the claimant has not been under a disability from September 29,
2004 through the date of the decision (Tr. 18).

1 worker, and a customer service representative (Tr. 121, 164, 586-
2 589). She testified she last worked on March 16 or 19, 2007 (Tr.
3 568-569). Plaintiff has a driver's license and drives, but not at
4 night (Tr. 132). She lives with her fiancé and his mother (Tr.
5 583). In June 2007, plaintiff opined she could stand one hour. She
6 was able to lift 10 pounds frequently and 20 pounds occasionally
7 (Tr. 132).

8 SEQUENTIAL EVALUATION PROCESS

9 The Social Security Act (the "Act") defines "disability"
10 as the "inability to engage in any substantial gainful activity by
11 reason of any medically determinable physical or mental impairment
12 which can be expected to result in death or which has lasted or
13 can be expected to last for a continuous period of not less than
14 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act
15 also provides that a Plaintiff shall be determined to be under a
16 disability only if any impairments are of such severity that a
17 plaintiff is not only unable to do previous work but cannot,
18 considering plaintiff's age, education and work experiences,
19 engage in any other substantial gainful work which exists in the
20 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus,
21 the definition of disability consists of both medical and
22 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
23 (9th Cir. 2001).

24 The Commissioner has established a five-step sequential
25 evaluation process for determining whether a person is disabled.
26 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
27 is engaged in substantial gainful activities. If so, benefits are

1 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
2 the decision maker proceeds to step two, which determines whether
3 plaintiff has a medically severe impairment or combination of
4 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

5 If plaintiff does not have a severe impairment or combination
6 of impairments, the disability claim is denied. If the impairment
7 is severe, the evaluation proceeds to the third step, which
8 compares plaintiff's impairment with a number of listed
9 impairments acknowledged by the Commissioner to be so severe as to
10 preclude substantial gainful activity. 20 C.F.R. §§
11 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
12 App. 1. If the impairment meets or equals one of the listed
13 impairments, plaintiff is conclusively presumed to be disabled. If
14 the impairment is not one conclusively presumed to be disabling,
15 the evaluation proceeds to the fourth step, which determines
16 whether the impairment prevents plaintiff from performing work
17 which was performed in the past. If a plaintiff is able to perform
18 previous work, that Plaintiff is deemed not disabled. 20 C.F.R. §§
19 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's
20 residual functional capacity ("RFC") assessment is considered. If
21 plaintiff cannot perform this work, the fifth and final step in
22 the process determines whether plaintiff is able to perform other
23 work in the national economy in view of plaintiff's residual
24 functional capacity, age, education and past work experience. 20
25 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*,
26 482 U.S. 137 (1987).

27 The initial burden of proof rests upon plaintiff to establish

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1 a *prima facie* case of entitlement to disability benefits.
2 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
3 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
4 met once plaintiff establishes that a physical or mental
5 impairment prevents the performance of previous work. The burden
6 then shifts, at step five, to the Commissioner to show that (1)
7 plaintiff can perform other substantial gainful activity and (2) a
8 "significant number of jobs exist in the national economy" which
9 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
10 Cir. 1984).

11 STANDARD OF REVIEW

12 Congress has provided a limited scope of judicial review of a
13 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
14 the Commissioner's decision, made through an ALJ, when the
15 determination is not based on legal error and is supported by
16 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th
17 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
18 "The [Commissioner's] determination that a plaintiff is not
19 disabled will be upheld if the findings of fact are supported by
20 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
21 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is
22 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
23 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
24 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
25 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
26 573, 576 (9th Cir. 1988). Substantial evidence "means such
27 evidence as a reasonable mind might accept as adequate to support

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1 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
2 (citations omitted). "[S]uch inferences and conclusions as the
3 [Commissioner] may reasonably draw from the evidence" will also be
4 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
5 review, the Court considers the record as a whole, not just the
6 evidence supporting the decision of the Commissioner. *Weetman v.*
7 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v.*
8 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

9 It is the role of the trier of fact, not this Court, to
10 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
11 evidence supports more than one rational interpretation, the Court
12 may not substitute its judgment for that of the Commissioner.
13 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
14 (9th Cir. 1984). Nevertheless, a decision supported by substantial
15 evidence will still be set aside if the proper legal standards
16 were not applied in weighing the evidence and making the decision.
17 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
18 433 (9th Cir. 1987). Thus, if there is substantial evidence to
19 support the administrative findings, or if there is conflicting
20 evidence that will support a finding of either disability or
21 nondisability, the finding of the Commissioner is conclusive.
22 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

23 ALJ'S FINDINGS

24 At the outset, the ALJ found plaintiff was insured through
25 December 31, 2012 for DIB purposes (Tr. 11, 13). At step one ALJ
26 Chester found plaintiff engaged in substantial gainful activity
27 "between 2004 and at least part of 2007" (Tr. 13). At steps two

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1 and three, he found plaintiff suffers from diabetes, a depressive
2 disorder, and an anxiety-related disorder, impairments that are
3 severe but which do not alone or in combination meet or medically
4 equal a Listed impairment (Tr. 14, 15). The ALJ found plaintiff
5 less than completely credible (Tr. 17). At step four, he found Ms.
6 Gorman's RFC for a wide range of medium work enables her to
7 perform several past jobs (Tr. 17). Alternatively, he found at
8 step five there are other jobs she can do. Accordingly, plaintiff
9 is not disabled as defined by the Social Security Act (Tr. 17-18).

10 **ISSUES**

11 Plaintiff contends the Commissioner erred as a matter of law
12 because he improperly weighed the medical evidence, credibility,
13 and lay witness testimony, and committed error at steps 3 through
14 5 (Ct. Rec. 17 at 13). Asserting the ALJ's decision is supported
15 by substantial evidence and free of harmful legal error, the
16 Commissioner asks the Court to affirm (Ct. Rec. 24 at 24).

17 **DISCUSSION**

18 **A. Weighing medical evidence**

19 In social security proceedings, the claimant must prove the
20 existence of a physical or mental impairment by providing medical
21 evidence consisting of signs, symptoms, and laboratory findings;
22 the claimant's own statement of symptoms alone will not suffice.
23 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
24 on the basis of a medically determinable impairment which can be
25 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
26 medical evidence of an underlying impairment has been shown,
27 medical findings are not required to support the alleged severity

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1 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir.
2 1991)(en banc).

3 A treating physician's opinion is given special weight
4 because of familiarity with the claimant and the claimant's
5 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir.
6 1989). However, the treating physician's opinion is not
7 "necessarily conclusive as to either a physical condition or the
8 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
9 751(9th Cir. 1989)(citations omitted). More weight is given to a
10 treating physician than an examining physician. *Lester v. Chater*,
11 81 F.3d 821, 830 (9th Cir. 1995). Correspondingly, more weight is
12 given to the opinions of treating and examining physicians than to
13 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592
14 (9th Cir. 2004). If the treating or examining physician's opinions
15 are not contradicted, they can be rejected only with clear and
16 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the
17 ALJ may reject an opinion if he states specific, legitimate
18 reasons that are supported by substantial evidence. See *Flaten v.*
19 *Secretary of Health and Human Serv.*, 44 F.3d 1435, 1463 (9th Cir.
20 1995).

21 In addition to the testimony of a nonexamining medical
22 advisor, the ALJ must have other evidence to support a decision to
23 reject the opinion of a treating physician, such as laboratory
24 test results, contrary reports from examining physicians, and
25 testimony from the claimant that was inconsistent with the
26 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d at
27 751-752; *Andrews v. Shalala*, 53 F.3d 1042-43 (9th Cir. 1995).

1 The ALJ considered the February 28, 2009, opinion of
2 examining psychologist Jay M. Toews, Ed.D. (Tr. 14; 459-474). Dr.
3 Toews observes that December 2006 records from Chelan-Douglas
4 County Mental Health indicate plaintiff has been in remission from
5 substance abuse for nine months (Tr. 459). Ms. Gorman told Dr.
6 Toews she had been clean since July 2002 (Tr. 461) and testified
7 she became clean in July 2001 (Tr. 552, 583). The ALJ does not
8 refer to the inconsistencies.

9 Plaintiff told Dr. Toews she found her last job, at Wal Mart,
10 too stressful "due to family issues." She returned to this job
11 after an eight month leave of absence. Ms. Gorman was fired for
12 sleeping on the job, as a result of being over-medicated. At the
13 time of this evaluation plaintiff had completed all tests needed
14 to obtain her GED except math (Tr. 462, 569). She told Dr. Toews
15 she does no meal planning or preparation because "she doesn't want
16 to." Occasionally she does light housework and laundry. Plaintiff
17 drives, watches television, avoids shopping, and is "irritable and
18 argumentative" (Tr. 462).

19 Dr. Toews notes attention, concentration and effort were
20 poor. Plaintiff did not appear anxious or depressed. Mood and
21 affect were not congruent with complaints of anxiety, depression,
22 and PTSD (Tr. 462-463). The test of memory malingering (TOMM) was
23 of questionable validity, indicating less than optimal cooperation
24 and "probable motivation to deliberately distort memory
25 functioning" (Tr. 463). MMPI results were "patently invalid." Dr.
26 Toews opined scores like plaintiff's typically indicate deliberate
27 non-cooperation with testing. Scores on the SIMS (Structured

1 Inventory of Malingered Symptoms) are "suggestive of malingering
2 psychiatric problems." Plaintiff was marginally compliant with the
3 evaluation (Tr. 464). Dr. Toews diagnosed, in part, exaggeration
4 of psychopathology, probable malingering (Tr. 465). He assessed
5 moderate limitations with respect to complex instructions and
6 work-related decisions, and in the ability to work with the public
7 (Tr. 472-473).

8 Plaintiff's testimony is inconsistent with her statements to
9 Dr. Toews. She testified she was not fired but quit her job and
10 could go back if medically cleared (Tr. 571).

11 The ALJ found plaintiff has only one mental limitation: she
12 is limited to superficial contact with the general public (Tr.
13 15). He did not limit her to simple tasks, apparently rejecting
14 Dr. Toews' assessed moderate limitation in this area. The ALJ
15 gives no reasons for the omission.

16 The ALJ is required to give specific and legitimate reasons
17 for rejecting an examining professional's contradicted opinion.
18 *Flaten*, 44 F.3d at 1463.

19 The Commissioner asserts because two of the jobs identified
20 by the VE are unskilled, the ALJ's error in failing to limit
21 plaintiff to simple tasks is harmless (Ct. Rec. 24 at 22-23).
22 The Commissioner is incorrect because the ALJ rejected without
23 comment additional assessed limitations.

24 With respect to Dr. McKnight's testimony the ALJ states:

25 [He] noted that despite indications that she had
26 difficulty leaving her home (agoraphobia), she has
27 been seen by a number of different medical care
28 providers, and only some on a regular basis. He
opined that she had PTSD and had been diagnosed
with a panic disorder but it was unclear that she

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1 had agoraphobia; and a dysthymic disorder, with
2 superimposed depression, and that cognitive
therapy would be helpful.

3 (Tr. 17).

4 More significantly, Dr. McKnight assessed moderate
5 limitations in understanding, remembering, and carrying out
6 detailed/complex instructions, in getting along with co-
7 workers/peers without distractions or exhibiting behavioral
8 extremes,² and in the ability to accept instructions and respond
9 appropriately to criticism from supervisors (Tr. 17, 560-561,
10 563). As noted the only mental limitation the ALJ included is
11 superficial public contact.

12 The ALJ is required to give clear and convincing reasons for
13 rejecting a treating or examining physician's uncontradicted
14 opinion, and specific, legitimate reasons supported by substantial
15 evidence for rejecting their contradicted opinions. *Lester*, 81
16 F.3d at 830; *Flaten*, 44 F.3d at 1463. This was not done with
17 respect to the opinion of Dr. Toews. And the ALJ does not indicate
18 why he rejected two of the reviewing psychologist's (Dr.
19 McKnight's) assessed limitations.

20 If plaintiff's RFC includes a moderate limitation in the
21 ability to get along with co-workers or peers, and/or in the
22 ability to accept instructions and respond appropriately to
23 criticism, the VE's testimony may yield a different result. The
24 error therefore requires reversal.

25
26 ²With respect to the "paragraph B" criteria, the ALJ notes
27 Dr. McKnight opined plaintiff has moderate difficulties in
28 maintaining social functioning and moderate difficulties in
maintaining concentration, persistence or pace (Tr. 15, 564).

1 Plaintiff alleges the ALJ failed to properly weigh the
2 opinions of other treating and examining professionals: Fishburne
3 (Tr. 304), Parker (Tr. 373), Akers (Tr. 405), Morgan (Tr. 379),
4 Stemm (Tr. 374), Hansen (Tr. 424, 437), and Revay (Tr. 364, 368)
5 (Ct. Rec. 17 at 16).

6 Jeanette Revay, ARNP, assessed plaintiff in 2004 and 2005,
7 years before onset in March 2007 (Tr. 364, 368). Similarly, James
8 Parker, M.D., evaluated plaintiff in April 2005, almost two years
9 before onset (Tr. 371). The court agrees with the Commissioner
10 that because plaintiff engaged in SGA until some time in 2007,
11 these opinions are not relevant.

12 The record contains more relevant opinions. After his July
13 2007 evaluation, four months post-onset, John Fishburne, Ph.D.,
14 assessed a current GAF of 52, indicative of moderate symptoms or
15 functional difficulties. Dr. Fishburne opined plaintiff's
16 condition is "very amenable to medication and psychological
17 treatment," as the ALJ observes (Tr. 14, 304).

18 About seven months after onset, in October 2007, plaintiff's
19 treating therapist Eric Stemm, M. Ed., opined she experienced
20 symptoms of PTSD and agoraphobia to a significant degree. He notes
21 severe anxiety is debilitating and prevents social interaction.
22 Ms. Gorman is unable to leave home for long periods of time and
23 has transportation problems. Mr. Stemm notes she is working in
24 therapy on reducing the intensity of her anxiety (Tr. 374-375).

25 The ALJ refers to this opinion. He states Exhibits 2F and 3F
26
27

(Tr. 360-380) are "disability endorsements" that "are not supported by any evidence since she was not seeking treatment and presented only as required for state assistance" (Tr. 14). The record indicates otherwise. Mr. Stemm refers to the therapy plaintiff is engaged in, therapy designed to decrease her anxiety. Although plaintiff was erratic in attending mental health treatment, the statement plaintiff "presented only as required for state assistance" is inaccurate.

In July 2008, Janice Morgan, ARNP, noted plaintiff restarted mental health treatment in June 2008 and had not taken psychotropic medication for about a month. Not noted by the ALJ, Ms. Morgan did not expect Ms. Gorman's assessed moderate, marked, and severe impairments to last twelve months (Tr. 380, 412).

On November 12, 2008, Lauren Akers, ARNP, evaluated plaintiff (Tr. 404-407). Ms. Gorman ran out of psychiatric medication in August and last obtained mental health treatment in Wenatchee before moving to Yakima (Tr. 404). Ms. Akers assessed a GAF of 45 and restarted psychotropic medication (Tr. 406).

Plaintiff alleges the ALJ should have accepted the results of assessments indicating greater limitations, such as the one performed by therapist Mary Hansen, MA, LMHC, on June 30, 2008 (Tr. 424, 427), when she assessed a GAF of 40³ (Ct. Rec. 17 at

³A Global Assessment of Functioning (GAF) of 40 indicates some impairment in reality testing or communication, or major impairment in several areas.

1 16).

2 While it is the ALJ's responsibility, not the Court's, to
3 resolve conflicts in the evidence, *Richardson*, 402 U.S. at 400,
4 the ALJ fails to state his reasons for rejecting most of the
5 opinion evidence, including the opinions of treatment provider
6 Marie Desire, M.D., from February 2007 (just before onset) through
7 October 2007 (Tr. 209-261), and of therapist Mr. Stemm (see e.g.,
8 Tr. 336)(counseling record).

9 **B. Lay witness testimony**

10 Plaintiff alleges the ALJ erred by failing to properly weigh
11 the lay witness testimony of her boyfriend, Pat Killion (Ct. Rec.
12 17 at 17, referring to Tr. 145-158). Citing *Lewis v. Apfel*, 236
13 F.3d 503, 511 99th Cir. 2001), the Commissioner agrees an ALJ
14 should give germane reasons for rejecting lay testimony but, he
15 argues, the error here is harmless (Ct. Rec. 24 at 23).

16 On June 27, 2007, about three months after onset, Mr. Killion
17 opined plaintiff has mood swings, cannot sit through a movie or
18 finish most things, loses concentration, and has "worries and
19 stresses every day" (Tr. 148). When depressed she does not take
20 care of herself.

21 Ms. Gorman does her son's laundry and occasionally cooks. She
22 works in her flowerbeds, and feeds the cat. She leaves the house
23 only for medical appointments and once a month to shop for
24 groceries. She does not often drive but talks on the phone daily
25 (Tr. 150-155, 157). Ms. Gorman attends GED classes 1-2 days a week
26 instead of four days a week as scheduled (Tr. 156). For five years
27 plaintiff worked for Wal Mart; she went on leave, and then quit

1 because she was "sick all the time, [and] she just couldn't go to
2 work anymore." Mr. Killion opined plaintiff has depression,
3 anxiety and is physically ill "all the time." She feels afraid and
4 out of her safety zone when away from home (Tr. 156-157).

5 The ALJ will address this opinion on remand.

6 After review the Court finds the ALJ committed error which
7 appears harmful.

8 **C. Remand**

9 On remand, the ALJ will specify the date plaintiff stopped
10 engaging in SGA, assess plaintiff's credibility, give reasons for
11 accepting or rejecting the opinions of Drs. Marie Desire, Jay
12 Toews, Thomas McKnight, and Mr. Stemm, and discuss the lay
13 testimony. The ALJ will conduct new steps 2-5 as necessary,
14 including determining plaintiff's RFC.

15 The court wishes to make clear it expresses no opinion as to
16 what the ultimate outcome on remand will or should be. The
17 Commissioner is free to give whatever weight to the medical and
18 lay witness evidence he deems appropriate. *Sample v. Schweiker*,
19 694 F.2d 639, 642 (9th Cir 1982)("[Q]uestions of credibility and
20 resolution of conflicts in the testimony are functions solely of
21 the Secretary.")

22 **CONCLUSION**

23 Having reviewed the record and the ALJ's conclusions, this
24 Court finds the ALJ's decision is not free of legal error.

25 **IT IS ORDERED:**

26 1. Plaintiff's motion for summary judgment (**Ct. Rec. 24**) is
27 **granted**. The ALJ's decision is **REVERSED and REMANDED** for further

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1 administrative proceedings pursuant to sentence four.

2 2. Defendant's motion for summary judgment (**Ct. Rec. 26**) is
3 **denied.**

4 The District Court Executive is directed to file this Order,
5 provide copies to counsel for plaintiff and defendant, enter
6 judgment in favor of plaintiff, and **CLOSE** this file.

7 DATED this 19th day of November, 2010.

8
9 s/ James P. Hutton

10 JAMES P. HUTTON

11 UNITED STATES MAGISTRATE JUDGE
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